SUBJECT INDEX

	Page
Interest of Amicus.....	x
Summary of the Argument.....	xii
Argument.....	1
I. THE UNITED STATES SUPREME COURT LACKS JURISDICTION UNDER TITLE 28, SECTION 1257(3) TO DETERMINE THE ISSUES PRESENTED IN THIS CASE SINCE THERE ARE INDEPENDENT STATE GROUNDS BASED ON THE CALIFORNIA STATE CONSTITUTIONAL PROHIBITION AGAINST UNREASONABLE SEARCHES AND SEIZURES AND THE STATE MANDATED EXCLUSIONARY RULE.....	1
A. When the California Supreme Court Rules on a Violation of Article I, Section 19 of the California Constitution Prohibiting Unreasonable Searches and Seizures, the United States Supreme Court Lacks Jurisdiction to Review that Decision Since an Independent and Adequate State Ground Exists for the State Court's Holding.....	3
1. The *Krivda* Decision is Based on the California State Constitution....	3
2. If Decision is Ambiguous As to Federal or State Grounds.....	16

Page

3. The Issue Presented Has Been Resolved by Subsequent State Decisions 19

B. Since the California Supreme Court Has Held That Its Exclusionary Rule is a Judicially Declared Rule of Evidence And Mandated by the California State Constitution, the Application of the Rule by the California Supreme Court Presents an Adequate State Ground Precluding This Court From Determining the Validity or Application of the Federal Exclusionary Rule..... 21

II. A CITIZEN HAS A RIGHT TO BE FREE UNDER THE FOURTH AMENDMENT FROM UNREASONABLE SEARCHES AND SEIZURES BY THE POLICE OF HIS DISPOSAL RECEPTACLE..... 25

A. The Reasonable Expectation of Privacy Test..... 25

B. Trash Collectors Acted for the Police..... 39

C. The Curtilage Doctrine... 44

III. THE EXCLUSIONARY RULE IS REQUIRED TO GIVE MEANING AND SUBSTANCE TO THE FOURTH AMENDMENT AND TO ENSURE THE CONTINUATION OF JUDICIAL INTEGRITY WITHIN THE CONCEPT OF ORDERED LIBERTY..... 48

A. The Rationale of the Rule 48

Page

B. Suggested Changes in the Rule..... 53

CONCLUSION..... 63

TABLE OF AUTHORITIES CITED

Abel v. United States, 362 U.S. 217 (1960)..... 35,36
A.F. Estabrook Company v. Industrial Accident Commission, 177 Cal. 767, 177 P. 848 (1918)... 24
Alderman v. United States, 394 U.S. 165 (1969)..... 23
Bailey v. Alabama, 219 U.S. 219 (1911)..... 46
Berger v. New York, 388 U.S. 41 (1967)..... 29
Bielicki v. Superior Court, 57 Cal.2d 602, 371 P.2d 288, 21 Cal.Rptr. 552 (1962)..... 10,11, 12,13
Bivens v. Six Unknown Federal Narcotics Agents, 403 U.S. 388 (1971)..... 49,53
Black v. Cutter Laboratories, 351 U.S. 292 (1956)..... 15,16
Boyd v. United States, 116 U.S. 616 (1886)..... 59
Britt v. Superior Court, 58 Cal. 2d 469, 374 P.2d 817, 24 Cal. Rptr. 849 (1962)..... 11, 12,13
Byars v. United States, 273 U.S. 27 (1927)..... 41,42
Care v. United States, 231 F.2d 22 (10th Cir. 1956).....44,46

	Page
Carpenter v. Sigler, 419 F.2d 169 (8th Circ. 1969).....	27
Clarke v. Neil, 427 F.2d 1322 (6th Circ. 1970).....	33
Cooper v. California, 386 U.S. 58 (1967).....	23
Corngold v. United States, 367 F.2d 1 (9th Cir. 1966).....	32,42, 43,44, 55
Department of Mental Hygiene of California v. Kirchner, 380 U.S. 194 (1965).....	2,3
Edelman v. California, 344 U.S. 357 (1953).....	24
Elkins v. United States, 364 U.S. 206 (1960).....	41
Fox Film Corporation v. Muller, 296 U.S. 207 (1935).....	2
Fraser v. United States, 452 F.2d 616 (7th Cir. 1971).....	27
Gold v. United States, 378 F.2d 588 (9th Cir. 1967).....	33
Herb v. Pitcairn, 324 U.S. 117 (1945).....	2, 15,18
Herndon v. Georgia, 295 U.S. 441 (1935).....	24
Hester v. United States, 265 U.S. 57 (1924).....	35
Jankovich v. Indiana Toll Road Commission, 379 U.S. 487 (1965)	14,15
Kaplan v. Superior Court, 6 Cal. 3d 150, 491 P.2d 1, 98 Cal. Rptr. 649 (1971).....	22,23
Katz v. United States, 389 U.S. 347 (1967).....	7,8,9, 10,11, 12,13, 15,16, 18,21, 25,26, 27,31

	Page
Linscomb v. Goodyear Tire and Rubber Co., 199 F.2d 431 (8th Cir. 1952).....	35
Mancusi v. De Forte, 392 U.S. 364 (1968).....	26
Mapp v. Ohio, 367 U.S. 643 (1961)	21,52
Massiah v. United States, 377 U.S. 201 (1964).....	41
Miller v. United States, 357 U.S. 301 (1958).....	51
Minnesota v. National Tea Company, 309 U.S. 551 (1940).....	16,17
Murdock v. City of Memphis, 87 U.S. 590 (1875).....	1,40
Olmstead v. United States, 277 U.S. 438 (1928).....	48,49
On Lee v. United States, 343 U.S. 747 (1951).....	49,50
People v. Bradley, 1 Cal.3d 80, 460 P.2d 129, 81 Cal. Rptr. 457 (1969).....	5,6,7, 8,9,10, 11,12, 13,18, 21
People v. Cahan, 44 Cal.2d 434, 282 P.2d 905 (1955).....	14,21, 22,55, 56,57
People v. Edwards, 71 Cal.2d 1096, 458 P.2d 713, 80 Cal. Rptr. 633 (1969).....	4,5,6, 7,8,9, 10,11, 12,18, 19,21, 38,39
People v. Fierro, 236 Cal. App. 2d 344, 46 Cal. Rptr. 132 (1965).....	40

	Page
People v. Krivda, 5 Cal.3d 357, 486 P.2d 1262, 96 Cal. Rptr. 62 (1971).....	3,4,6, 8,9,10, 12,13, 30,31, 34,35, 39,44, 45
People v. Martin, 45 Cal.2d 755, 290 P.2d 855 (1955).....	22
People v. Tarantino, 45 Cal.2d 590, 290 P.2d 505 (1955).....	40
Piazzola v. Watkins, 442 F.2d 284 (5th Cir. 1971).....	27
Purvis v. Wiseman, 298 F.Supp. 761 (D.C. Oregon, 1969).....	36
Rice v. Sioux City Cemetary, 349 U.S. 70 (1955).....	20
Sherbert v. Verner, 374 U.S. 398 (1963).....	46
Smayda v. United States, 352 F.2d 251 (9th Cir. 1965).....	13
Speiser v. Randall, 357 U.S. 513 (1958).....	46,47
Standard Oil of California v. Johnson, 316 U.S. 481 (1942)..	18
Stapleton v. Superior Court of Los Angeles County, 70 Cal.2d 97, 447 P.2d 967, 73 Cal. Rptr. 575 (1969).....	40
State v. Chapman, 250 A.2d 203 (S.C. Maine 1969).....	38
State v. Purvis, 249 Ore. 404, 438 P.2d 1002 (1968).....	36
State Tax Commission v. VanCott, 306 U.S. 511 (1939).....	17,18
Stoner v. California, 376 U.S. 483 (1964).....	32
Terry v. Ohio, 392 U.S. 1 (1968).....	12, 25,26

	Page
United States v. Case, 435 F.2d 766 (7th Cir. 1970).....	27
United States v. Dzialak, 441 F.2d 212 (2d Cir., 1971)..	36
United States v. Eldridge, 302 F.2d 463 (4th Cir. 1962).....	33
United States v. Guadalupe-Garza, 421 F.2d 876 (9th Cir. 1970).....	27
United States v. Jackson, 448 F.2d 963 (9th Cir. 1971).....	31
United States v. Masterson, 251 Fed.Supp. 937 (D.C.N.Y. 1966), aff'd 383 F.2d 610; cert. den. 385 U.S. 833.....	41
United States v. Minker, 312 F.2d 632 (3d Cir. 1962).....	35
United States v. On Lee, 193 F.2d 306 (2d Cir. 1951).....	29
United States v. Stroble, 431 F.2d 1273 (6th Cir. 1970).....	36
United States v. U.S. District Court Eastern Michigan, No. 70-153, June 19, 1972.....	29
Warden v. Hayden, 387 U.S. 294 (1967).....	27
Wattenburg v. United States, 388 F.2d 853 (9th Cir. 1968).....	27,44
Weeks v. United States, 232 U.S. 383 (1914).....	48,51
Williams v. Kaiser, 323 U.S. 471 (1945).....	17
Work v. United States, 243 F.2d 660 (D.C. Cir. 1957).....	37,38, 46,47

Page

CONSTITUTIONAL PROVISIONS

California Constitution, Article I, Section 19..... 3,4,6, 7,8,12, 13,16, 22

United States Constitution, Amendment IV..... 6,7,13, 25,29, 51,60, 61

United States Constitution, Article III..... 2

STATUTES

California Penal Code, Section 830, et seq..... 40

California Penal Code, Section 833, et seq..... 40

California Penal Code, Sections 1530-1533..... 40

California Penal Code, Section 1538.5..... 23,24

United States Code, Title 28, Section 1257(3)..... 1

RULE

United States Supreme Court Rules, Rule 19 (Revised)..... 19,20

Page

ARTICLES

Fried, *Privacy*, 77 Yale Law Journal 475 (1968)..... 28

Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 Chicago Law Review 665 (1970)..... 55,59

Paulsen, *The Exclusionary Rule and Misconduct by the Police*, 52 J. Crim. Law, C. and Pol. Sci., 255 (1961)..... 62

Traynor, *Mapp v. Ohio At Large in the Fifty States*, 1962 Duke Law Journal 319..... 28,58, 59

x

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

No.71-651

STATE OF CALIFORNIA,

Petitioner,

vs.

JUDITH H. KRIVDA and RODGER T. MINOR,

Respondents.

BRIEF OF CALIFORNIA PUBLIC DEFENDERS ASSOCIATION, AS AMICUS CURIAE IN SUPPORT OF THE RESPONDENTS

This brief is being filed with this Court pursuant to the authority found in Rule 42 of the Supreme Court Rules. Consent to file this brief was given by the Office of the Attorney General of the State of California, counsel for Petitioner, and by Mr. Roger S. Hanson, Esq., counsel for Respondents. Letters of consent of both parties should be on file with the Clerk of this Court.

Interest of the Amicus Curiae

The California Public Defenders Association is a non-profit corporation, incorporated under the laws of the State of California in 1969. It was formed to assist Public Defender Offices in California in their efforts to secure the constitutional rights of indigent defendants by vigorous and competent representation. The Association represents approximately 600 defense attorneys from thirty-four Public Defender Offices throughout the State of California.

A decision by this Court would have tremendous impact upon the rights of all indigent accused within the State of California. Further, if this Court rules upon the application of the Exclusionary Rule, the decision would have a profound effect upon state law since California adopted its own rule of exclusion in 1955 in *People v. Cahan*, 44 C.2d 434, 282 P.2d 905. The California Supreme Court has developed higher standards to govern violations of its state constitutional prohibition against unreasonable searches and seizures. Since a decision in this area could seriously threaten the constitutional rights of the indigent accused with respect to the protections afforded by Article I, Section 19 of the California Constitution and the Fourth and Fourteenth Amendments of the United States Constitution, the California State Public Defenders Association is filing this brief as Amicus pursuant to the unanimous vote of its Board of Directors.

Summary of Argument

In *People v. Krivda*, 5 C.3d 357, 486 P.2d 1262, 96 Cal. Rptr. 62 (1971), the California Supreme Court based its decision on California case law, interpreting Article I, Section 19 of the California State Constitution which prohibits unreasonable seizures and searches. Since this holding presents an adequate state ground for the decision by the California court, this Court lacks jurisdiction to reach any federal constitutional issues. *Murdock v. City of Memphis*, 87 U.S. 590 (1875); *Jankovich v. Indiana Toll Road Commission*, 379 U.S. 487 (1965).

The request by Petitioner that this Court narrow the scope of or eliminate the Exclusionary Rule cannot be granted since California developed its own, broader, Exclusionary Rule in *People v. Cahan*, 44 C.2d 434, 282 P.2d 905 (1955), before the decision of *Mapp v. Ohio*, 367 U.S. 643 (1961). This independent state development enlarged the exclusionary remedy in California over that found in the federal system. Therefore, any action by this Court would be in derogation of California's Exclusionary Rule, and any holding of this Court would be gratuitous since the state rule governs the case.

The California Supreme Court correctly ruled that an individual has a reasonable expectation of privacy as to the contents of his disposal receptacle. It

is not unwarranted to recognize the realities of our modern, urban society where an individual is required to dispose of his personal discards through the refuse collector. Respondent's action, in placing the items into his disposal receptacle, indicated an intent to dispose of the items rather than abandon them. The California court recognized this distinction and correctly held there was a reasonable expectation of privacy.

The Exclusionary Rule should not be narrowed or abolished since there are no effective alternatives to ensure that the Fourth Amendment continues to have meaning. Further, the Courts should not participate in the illegal violations of an accused's Fourth Amendment rights. Convictions, based on these illegalities, debase the courts and breed contempt for the entire criminal justice system.

ARGUMENT

I.

THE UNITED STATES SUPREME COURT LACKS JURISDICTION UNDER TITLE 28, SECTION 1257(3) TO DETERMINE THE ISSUES PRESENTED IN THIS CASE SINCE THERE ARE INDEPENDENT STATE GROUNDS BASED ON THE CALIFORNIA STATE CONSTITUTIONAL PROHIBITION AGAINST UNREASONABLE SEARCHES AND SEIZURES AND THE STATE MANDATED EXCLUSIONARY RULE.

Certiorari was granted in this case with probable jurisdiction noted under the authority of 28 U.S.C. Section 1257(3) which authorizes this Court to hear cases where,

> the validity of a state statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States. 28 *U.S.C. Section* 1257(3).

This Court has held that certiorari should not be granted in a case where state law is dispositive of the issue. *Murdock v. City of Memphis*, 87 U.S. 590 (20 Wall 590) 22 L.Ed. 429 (1875). The 1867 revision of Section 25 of the

Judiciary Act of 1789 by Congress was held to be indicative of an intent that the federal courts were not to interfere with state court decisions based on state grounds.

> (W)here the judgment of a state court rests upon two grounds, one of which is federal and the other non-federal in character, our jurisdiction fails if the non-federal ground is independent of the federal ground and adequate to support the judgment. *Fox Film Corporation v. Muller*, 296 U.S. 207, 210 (1935).

In 1945, this Court in *Herb v. Pitcairn*, 324 U.S. 117 (1945) considered this question and decided that the Court should not render advisory opinions since the "case or controversy" requirement of Article III of the United States Constitution precluded such a result.

> Were (this Court) to assume that the federal question was the basis for the decision below, it is clear that the California Supreme Court, either on remand or in another case presenting the same issues, could inform us that its opinion was in fact based, at least in part, on the California Constitution, thus leaving the result untouched by whatever conclusions this Court might have reached on the merits of the federal question. *Department of Mental Hygiene of*

California v. Kirchner, 380 U.S. 194, at 197 (1965).

It is clear that if an independent and adequate state ground exists for the decision rendered by the state court, this Court is not free to review that decision. It is the contention of Amicus that the California Supreme Court rested its decision in *People v. Krivda*, 5 C.3d 357, 486 P.2d 1262, 96 Cal. Rptr. 62 (1971), on an interpretation of the California State Constitution, Article I, Section 19. The California Supreme Court's reliance on the California State Constitution presents an adequate and independent state ground precluding this Court from reviewing the propriety of that ruling.

A. When the California Supreme Court Rules on a Violation of Article I, Section 19 of the California Constitution Prohibiting Unreasonable Searches and Seizures, the United States Supreme Court Lacks Jurisdiction to Review That Decision Since An Independent And Adequate State Ground Exists for the State Court's Holding.

1. The Krivda Decision is Based on the California State Constitution.

Article I, Section 19 of the California State Constitution prohibits unreasonable searches and seizures in California.

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable seizures and searches, shall not be violated; and no warrant shall issue, but on probable cause, supported by oath or affirmation, particularly describing the place to be searched and the persons and things to be seized. *West's Annotated Constitution, Article I, Section 19.*

The California Supreme Court has on numerous occasions enunciated rules for the application of this mandate prohibiting illegal searches and seizures. In its discussion of the "reasonable expectation of privacy" test in the case at bar, the California court referred specifically to cases which were grounded on the authority of Article I, Section 19, as well as the Fourth Amendment of the United States Constitution. [See *People v. Krivda*, 5 C.3d 357, 364, 486 P.2d 1262, 1267, 96 Cal. Rptr. 62, 67 (1971), wherein the court cites *People v. Edwards*,[1] 71 C.2d 1096, 458 P.2d 713, 80 Cal. Rptr. 633 (1969) and

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[1] Defendant's neighbor informed police that a week before he had seen on defendant's back porch a large plastic bag containing packages, one of which was torn and contained a dark green vegetable substance with a smell unlike alfalfa and small funny type seed. The police entered into defendant's open backyard area without a search warrant.

People v. Bradley,[2] 1 C.3d 80, 460 P.2d 129, 81 Cal. Rptr. 457 (1969).] Indeed, in the holding the Court points out that,

> It is also clear, as in *Edwards*, that defendants' reasonable expectation of privacy was violated by unreasonable governmental intrusion. (See *People v. Edwards*,

---

They saw three trash cans located two to three feet from the back porch. In one can, they found a small amount of marijuana. The police took the material to be analyzed. They returned later without a search or arrest warrant and arrested the defendant and his wife in their house. The police searched the house after permission to do so was refused. Marijuana and LSD were found inside the house. The Supreme Court held these searches to be violative of the state and federal constitutions.

[2]On the information of an untested informer that defendant possessed and sold marijuana, the police went to the defendant's home without a search warrant. The police saw a marijuana plant growing in the backyard twenty feet from the defendant's door. The police then entered the defendant's residence without demanding admittance. The defendant was placed under arrest. The police searched the home without defendant's consent and found contraband. The court excluded the evidence found inside the house but admitted into evidence the marijuana plant found outside the house.

> *supra*, 71 C.2d 1096, 1104-1105.) We should hesitate to encourage a practice whereby our citizens' trash cans could be made the subject of police inspection without the protection of applying for and securing a search warrant. *People v. Krivda*, 5 C.3d 357, 367, 486 P.2d 1262, 1269, 96 Cal. Rptr. 62, 69 (1971).

The reference to pages 1104-1105 of *Edwards* is significant since it is directed to that section of the opinion which bottoms the ruling on the State Constitution, Article I, Section 19, as well as the Fourth Amendment of the United States Constitution.

> In the instant case it does not appear that any of the exceptions apply to the search of the trash can. Accordingly, that search was unlawful under the Fourth Amendment of the federal Constitution. *It similarly violated article I, section 19, of the California Constitution.* The trial court thus erred in admitting the evidence found in the trash can. *People v. Edwards*, 71 C.2d 1096, 1105, 458 P.2d 713, 718, 80 Cal.Rptr. 633, 638 (1969). (Emphasis added.)

People v. Bradley, *supra*, is also cited as authority for the proper test to apply when determining whether an

unreasonable search or seizure took place. The California Supreme Court based its decision, in part, on Article I, Section 19 of the State Constitution. After stating the provisions of the Fourth Amendment, the court went on to point out,

> (a)n essentially identical guarantee of personal privacy is contained in article I, section 19, of the California Constitution. *People v. Bradley*, 1 C.3d 80, 84, 460 P.2d 129, 131, 81 Cal. Rptr. 457, 459 (1969).

Petitioner, in his Opening Brief at 24 and in his Petition for Certiorari at 10, claims the California Supreme Court misinterpreted *Katz v. U.S.*, 389 U.S. 347 (1967), and improperly applied it to the case at bar. However, a closer reading of the opinion reveals that the California Supreme Court was merely alluding to similar principles in *Katz v. U.S.*, *supra*, and used it as authority for the "reasonable expectation of privacy" test under the Fourth Amendment of the United States Constitution. No further reference is made to *Katz v. U.S.*, *supra*, and, in the Court's holding, the authority relied upon are two California cases, *People v. Edwards*, 71 C.2d 1096, 458 P.2d 713, 80 Cal. Rptr. 633 (1969), and *People v. Bradley*, 1 C.3d 80, 460 P.2d 129, 81 Cal. Rptr. 457 (1969), which applied the reasonable expectation of privacy test under the California State Constitution, Article I, Section 19. Consequently, the only reasonable

conclusion that can be drawn is that the court was employing a similar test to that found in *Katz v. U.S., supra,* but mandated by California caselaw under Article I, Section 19. Consider the language of the court:

> [W]e have held that an appropriate test is whether the person has exhibited a reasonable expectation of privacy, and, if so, whether that expectation has been violated by unreasonable governmental intrusion. (*People v. Bradley,* 1 C.3d 80, 84; *People v. Edwards, supra,* 71 C.2d 1096, 1104-1105).
>
> *People v. Krivda,* 5 C.3d 357, 364, 486 P.2d 1262, 1267, 96 Cal. Rptr. 62, 67 (1971).

It is important to note that the court cited *Edwards,* not *Katz,* as authority for its holding. The reference to *Edwards* in *Krivda* was significant in that the court, although finding it unnecessary to apply *Edwards* retroactively, relied upon the logic in *Edwards.*[3]

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[3]This citation to *Edwards* is important since the *Krivda* search preceded the holding in *Edwards* but was after this Court's decision in *Katz.* The California court carefully points out that *Edwards* resolved the issue presented while failing to reach the question as to its actual application. Apparently, the court did not want to decide the retroactivity issue.

Further, the court went to considerable lengths on two occasions to point out the applicability of the holding in *Edwards*.

> We would be reluctant to distinguish *Edwards* solely on the basis that the defendant in that case was permitted to place his trash barrels in his backyard for collection. *People v. Krivda*, 5 C.3d 357, 366, 486 P.2d 1262, 1268, 96 Cal. Rptr. 62, 68 (1971) at fn. 7.

> The fact that the officers did not examine the contents until the trash had been placed into the well of the refuse truck does not distinguish *Edwards*, for at no time did defendants' trash lose its "identity" by being mixed and combined with the "conglomeration" of trash previously placed in the truck. Under such circumstances, we hold that defendants had a reasonable expectation that their trash would not be rummaged through and picked over by police officers acting without a search warrant. *People v. Krivda*, 5 C.3d 357, 366-367, 486 P.2d 1262, 1268, 96 Cal. Rptr. 62, 68 (1971).

The court failed to cite *Katz* as the authority for its holding and merely noted that *Katz* contained principles similar to those enunciated in *Edwards* and *Bradley*.

> We conclude that the principles of *Edwards* and *Bradley*, to the extent they depend upon like principles in *Katz v. U.S.*, *supra*, may properly be applied to test the validity of the search and seizure at issue herein. *People v. Krivda*, 5 C.3d 357, 365, 486 P.2d 1262, 1267, 96 Cal. Rptr. 62, 67 (1971).

Note the language employed by the court and the issue for which it is cited. The paragraph deals with the question of the prospective application of *Edwards* and *Bradley*. *Katz* was cited as an example of the fact that *Edwards* and *Bradley* created no new law, but were simply a continuation of an historically developed test that "was put forth *at least* as early as *Katz*." *People v. Krivda*, 5 C.3d 357, 365, 486 P.2d 1262, 1267, 96 Cal. Rptr. 62, 67 (1971). (Emphasis added.) The reference to "at least as early as *Katz*" would indicate that the test may even have pre-dated *Katz*, as the California court implied in *Edwards* and *Bradley* by citing as authority for the "reasonable expectation of privacy" test the pre-*Katz* California decisions of *Bielicki v. Superior Court*,[4]

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[4] In *Bielicki*, *supra*, the police, authorized by the owner of an amusement park, went to the roof of a building in the park housing a group of pay toilets. A pipe, installed through the roof of the building over two of the toilet stalls,

57 C.2d 602, 371 P.2d 288, 21 Cal. Rptr. 552 (1962) and *Britt v. Superior Court*,[5] 58 C.2d 469, 374 P.2d 817, 24 Cal. Rptr. 849 (1962). The pointed reference to "like principles in *Katz*" would appear to be a recognition of the parallel development of state principles for the proper test tó judge illegal searches and seizures. The citation of *Katz* in this context underscores that *Katz* is merely being offered as an example to support the fact that *Edwards* and *Bradley* established no new constitutional principles. The reference to *Katz* is useful since it points out that the test of "constitutionally protected areas," which was often used in cases prior to *Katz*, was not the only test to be employed in determining the validity of a search or seizure. California, which had developed its own privacy test as early as *Britt v. Superior Court*,

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enabled police to look through and observe the defendant engaging in criminal activity. The California Supreme Court held this violative of the defendant's right to be free from unreasonable searches and seizures.

[5]In *Britt*, *supra*, a policeman viewed defendants engaging in criminal activity in the men's restroom. This activity was viewed through two vents installed in the ceiling of the restroom. On the authority of *Bielicki*, *supra*, this was held violative of the state and federal constitutions.

supra, and *Bielicki v. Superior Court*, *supra*, merely noted the same test in the federal courts was used "at least as early as *Katz*."

In light of the California Supreme Court's citation of *Edwards* and *Bradley* as authority to employ California's privacy test and its citation of *Edwards alone* in support of the determination of what constitutes a reasonable standard of privacy, the reference to *Katz* is merely gratuitous and not authority for the holding in *Krivda*.

The same Justice wrote the opinions of the court in *Edwards*, *Bradley* and *Krivda*. It would be odd, indeed, if, after *Edwards* and *Bradley* specifically referred to Article I, Section 19, of the California Constitution and were based on a privacy theory flowing from both the California and Federal Constitutions, the Court were to turn around and base its decision in *Krivda* solely on the federal constitution. This is especially unlikely in light of the final holding of *Krivda* which relies on *Edwards*.

The development in California of a theory based on the reasonable expectation of privacy test can be traced to pre-*Katz* decisions. For example, in his concurrence and dissent in *People v. Bradley*, 1 C.3d 80, 90, 91, 460 P.2d 129, 135, 136, 81 Cal. Rptr. 457, 463, 464 (1969), Justice Tobriner cites *Bielicki* and *Britt*, *supra*, as well as *Katz* and *Terry v. Ohio*, 392 U.S. 1 (1968) for the

proposition that protection against unreasonable searches and seizures is not "delimited by common law definitions of the curtilage, but extends 'wherever an individual may harbor a reasonable "expectation of privacy.'" It is important to note here that both *Bielicki* and *Britt* pre-date *Katz*, and both cases rest on Article I, Section 19 of the California Constitution, as well as the Fourth Amendment of the Federal Constitution. *Bielicki v. Superior Court*, 57 C.2d 602, 605, 371 P.2d 288, 289, 21 Cal. Rptr. 552, 553 (1962), and *Britt v. Superior Court*, 58 C.2d 469, 470, 374 P.2d 817, 817, 24 Cal. Rptr. 849, 849 (1962). Language in *Britt v. Superior Court*, 58 C.2d 469, 473, 374 P.2d 817, 819, 24 Cal. Rptr. 849, 851 (1962), supports the contention that *Krivda* is based on the state constitution, since the court specifically held that the search was impermissible and "hence [the evidence] was inadmissible *under the settled law of this state.*" (Emphasis added.)

These two cases were cited in the majority decision in *Bradley* despite the fact that the 9th Circuit had refused to follow their logic in *Smayda v. U.S.*, 352 F.2d 251 (9th Cir. 1965). This clearly indicates that the California Supreme Court recognized its independent right to develop theories in this area under state constitutional authority. This conclusion is consistent with the California court's refusal to follow the federal limitations on standing, discussed *infra*, at 23, and its pre-*Mapp*

adoption of the exclusionary rule. [See *People v. Cahan*, 44 C.2d 434, 282 P.2d 905 (1955).]

The conclusion is inescapable that this Court lacks jurisdiction to hear this case. Although the state court relied on "similar provisions in both the State and Federal Constitutions, the state constitutional provision ... provide(s) an independent and adequate ground of decision depriving this Court of jurisdiction to review the state judgment." *Jankovich v. Indiana Toll Road Commission*, 379 U.S. 487, 491-492 (1965).

The fact that the California Supreme Court considered the provisions of the California Constitution and the federal constitution together, rather than analyzed them separately, does not imply that the state ground based on the state constitution "is so interwoven with the (federal ground based on the federal constitution) as not to be an independent matter ..." *Jankovich v. Indiana Toll Road Commission, supra*, at 490. This issue was forcefully answered in *Jankovich, supra*. In that case the state court decision relied upon state and federal constitutional provisions. The court noted that the Indiana Supreme Court discussed the Federal Constitution, United States Supreme Court cases, the state constitution, a prior state case interpreting state law, and other state precedent. This Court stated,

> But nothing in the court's opinion suggests that its conclusion ... flows from a federal rather than a state source. Indeed, the organization and language of the opinion indicates (sic) that, at the least, state law is an equal ground of decision.... (T)here is no intimation that the conclusion ... is based less forcefully on the Indiana Constitution than on the Fourteenth Amendment. *Id.*, at 491.

In the case at bar, the California Supreme Court referred to state decisional law for its holding no less forcefully than it referred to "like principles" found in *Katz*. As this Court observed in *Herb v. Pitcairn, supra*, at 126, "[O]ur power is to correct wrong judgments, not to revise opinions." The occasional references to *Katz* in the state court opinion in the case at bar does not lessen the fact that an adequate and independent state ground exists.

> ...(I)t is our duty to look beyond the broad sweep of the language and determine for ourselves precisely the ground on which the judgment rests. This means no more than that we should not pass on federal questions discussed in the opinion where it appears that the judgment rests on adequate state grounds. *Black v. Cutter Laboratories*, 351 U.S. 292, 298 (1956).

> It is possible that the state court employed the decisions under the federal constitution merely as persuasive authorities for its independent interpretation of the state constitution. If that were true, we would have no jurisdiction to review. *Minnesota v. National Tea Co.*, 309 U.S. 551, 556 (1940).

This Court has no choice but to dismiss the present case for lack of jurisdiction.

2. Decision Ambiguous As To Federal or State Grounds.

Even if this Court were to hold that the reference to *Katz, supra,* and the state decisional law under Article I, Section 19, is ambiguous, the case must be dismissed rather than remanded, since it cannot be affirmatively shown that a decision of the federal question was necessary to the determination of the issue.

> (E)ven if the State Court's opinion be considered ambiguous, we should choose the interpretation which does not face us with a constitutional question. *Black v. Cutter Laboratories, supra,* at 299.
>
> It is a well established principle of this Court that before

> we will review a decision of a state court it must *affirmatively* appear from the record that the federal question was presented to the highest court of the State having jurisdiction and that its decision of the federal question was necessary to its determination of the cause. *Williams v. Kaiser*, 323 U.S. 471, 477 (1945). (Emphasis added.)

Although this Court in *Minnesota v. National Tea Co., supra,* and *State Tax Commission v. Van Cott,* 306 U.S. 511 (1939), remanded to clear up the ambiguity, the facts are clearly distinguishable from those at bar. In *Minnesota* this Court relied solely on the statement made by the Minnesota Supreme Court that five decisions (two were U.S. Supreme Court cases, one was a federal case, one was a Wisconsin case, and one was a Vermont case) directly deciding the issue, disposed of the question and it was the state court's duty to follow them. The state supreme court either had no state case law supporting the issue, or it failed to rely on state precedent in a resolution of the question. The California Supreme Court, in the case at bar, cited its own case law to justify its holding. Clearly, California had adequate state authority to support its decision. Similarly, in *Van Cott,* the state supreme court thought the federal constitution, as construed by the United States Supreme Court, required it to hold the respondent

taxable. Relying on that holding, this Court remanded the decision for clarification. Since the California Supreme Court relied on state precedent in the instant case, remand is not necessary. This Court should not indulge in gratuitous dissertations on constitutional law. State courts must be left free and unfettered to interpret their own constitutions.[6] Therefore, the petition for writ of certiorari should be dismissed.

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[6]If this Court determines that dismissal is not the appropriate remedy in this case, it should remand for two reasons:

(a) The California Supreme Court should clarify its holding. "(I)t seems consistent with the respect due the highest courts of the states of the Union that they be asked rather than told what they have intended." *Herb v. Pitcairn, supra,* at 128.

(b) Under the authority of *Standard Oil of California v. Johnson,* 316 U.S. 481 (1942), this Court would have to remand the case to the California Supreme Court to decide the prospective application of *Edwards* and *Bradley* and resolve the question of the application of pre-*Katz* cases dealing with the reasonable expectation of privacy test. Before a final judgment can be entered, this unresolved state issue must be decided by the state court.

3. The Issue Presented Has Been Resolved By Subsequent State Decisions.

This Court lacks jurisdiction to decide this case since the issue presented has been resolved by California decisional law. The California State Supreme Court held in *Edwards* that individuals have a reasonable expectation of privacy with respect to the contents of their trash cans until it is commingled with that of the community. Under the authority of *Edwards*, therefore, any search and seizure in California of a trash can located inside a defendant's backyard or located on the sidewalk in front of his residence is in violation of the California Constitution.

Rule 19 of the Revised Rules of the Supreme Court of the United States reads in part,

> 1. A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are *special and important reasons* therefor. The following, while neither controlling nor fully measuring the court's discretion, indicate the character of reasons which will be considered:
>
> a) where a state court has decided a *federal question of substance* not theretofore determined by this

> court, or has decided it in a way probably not in accord with applicable decisions of this court. (Emphasis added.)

The United States Supreme Court in *Rice v. Sioux City Cemetary*, 349 U.S. 70 (1955), had occasion to interpret the language "special and important reasons" contained in Rule 19. In considering a petition filed for a rehearing, this Court found that a state statute, enacted after the litigation was commenced, was dispositive of the issue presented, thereby precluding the issue from arising again. As a consequence, this Court held that there were no "special and important reasons" for granting certiorari on a "federal question of substance" if this Court's decision would merely "benefit ... the particular litigants." (See *Rice v. Sioux City Cemetary, supra*, at 74.) The time of this Court should not be spent resolving a problem of scholastic interest only.

> "Special and important reasons" imply a reach to a problem beyond the academic or the episodic. This is especially true where the issues involved reach constitutional dimensions, for then there comes into play regard for the Court's duty to avoid decision of constitutional issues unless avoidance becomes evasion. *Id.*, at 74.

The instant case presents the identical issue, since the state Supreme Court resolved the question in *Edwards* and *Bradley*. Any opinion by this Court would have no impact on future decisions of the state court, since the issue has been resolved. Therefore, this Court should dismiss the petition for writ of certiorari as improvidently granted.

B. Since the California Supreme Court Has Held That Its Exclusionary Rule is a Judicially Declared Rule of Evidence And Mandated by the California State Constitution, the Application of the Rule by the California Supreme Court Presents an Adequate State Ground Precluding This Court From Determining the Validity or Application of the Federal Exclusionary Rule.

Assuming *arguendo* that this Court is able to reach the substantive issue of the application of *Katz* to the facts of the case at bar, this Court cannot reach the validity or application of the federal exclusionary rule as a remedy since the California state exclusionary rule presents an independent state ground precluding federal jurisdiction.

Prior to this Court's decision in *Mapp v. Ohio*, 367 U.S. 643 (1961), the California Supreme Court held in *People v. Cahan*, 44 C.2d 434, 282 P.2d 905

(1955), that the exclusionary rule in California was a "judicially declared rule of evidence." Chief Justice Traynor wrote that the rule was necessary to perpetuate the "concept of ordered liberty." The rule was not justified solely on the federal theory that evidence should be excluded to provide a remedy for a wrong done to a defendant. Rather, the Court held that the rule in California was compelled because "the government must not be allowed to profit by its own wrong and thus be encouraged in the lawless enforcement of the law." *People v. Martin*, 45 C.2d 755, 761, 290 P.2d 855, 857 (1955). As late as 1971, the California Supreme Court acknowledged that the exclusionary rule was required in "order to give substance to the rights conferred by the provisions of our federal and *state Constitutions* prohibiting illegal seizures." *Kaplan v. Superior Court*, 6 C.3d 150, 161, 491 P.2d 1, 98 Cal.Rptr. 649 (1971). (Emphasis added.) The court went on to cite the authority of Article I, Section 19 of the California State Constitution. If there were any doubt that the California Supreme Court was interpreting its own constitution, this was laid to rest by the words of Justice Burke in his concurrence and dissent, when he pointed out that his fellow justices were determining the scope of the exclusionary rule and had "abandoned further reliance upon federal constitutional principles, as defined by the United States Supreme Court." *Ibid.*, 6 C.3d at 162, 491 P.2d at 8, 98 Cal. Rptr. at 656.

A person need not be a constitutional scholar to recognize that California has not only developed its own rules for the suppression of evidence but broadened their coverage beyond that afforded by this Court's interpretation of the federal exclusionary rule. For example, in *Kaplan v. Superior Court, supra,* the California Supreme Court endorsed once again the vicarious exclusionary rule despite the fact that the holding was contrary to this Court's decision in *Alderman v. United States,* 394 U.S. 165 (1969). California has decided to adopt higher standards for the implementation of its citizens' right to be free from unreasonable searches and seizures.[7]

Penal Code Section 1538.5[8] was adopted to implement the California decisions requiring the exclusion of

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[7] This Court, in fact, invited such independence. "Of course, Congress or state legislatures may extend the exclusionary rule and provide that illegally seized evidence is inadmissible against anyone for any purpose." *Alderman v. U.S.,* 394 U.S. 165, 175 (1969).

"Our holding, of course, does not affect the State's power to impose higher standards on searches and seizures than required by the Federal Constitution if it chooses to do so." *Cooper v. California,* 386 U.S. 58, 62 (1967).

[8] "A defendant may move for the return of property or to suppress as evidence any tangible or intangible thing obtained as a result of a search or seizure ..."

evidence. In the case at bar, this vehicle was used to suppress the evidence found in the defendant's garbage can. Since California has its own exclusionary rule and its application is not in conflict with the federal constitution, there is no federal question presented for this Court to decide. As was stated by this Court in *Edelman v. California*, 344 U.S. 357, 361-362 (1953).

> This is not a case in which there is serious doubt about the nature of the ground on which the decision below rested. *(Citations)* We are thus without power to decide petitioner's claim on the merits, whatever may be their appeal. The writ was improvidently granted and must be dismissed.

This Court has no jurisdiction to decide the validity of the federal exclusionary rule since the application of the state exclusionary rule rested on an adequate state ground. [9]

West's Annotated Penal Code, Section 1538.5(a).

[9] It would appear under the authority of *Herndon v. Georgia*, 295 U.S. 441 (1935) that this issue cannot be raised for the first time on petition for rehearing in the state courts nor petition for writ of certiorari in this Court. (See also *A. F. Estabrook Co. v. Industrial Accident Commission*, 177 Cal. 767, 771, 177 P. 848, 849 (1918).

II.

A CITIZEN HAS A RIGHT TO BE FREE UNDER THE FOURTH AMENDMENT FROM UNREASONABLE SEARCHES AND SEIZURES BY THE POLICE OF HIS DISPOSAL RECEPTACLE.

A. The Reasonable Expectation of Privacy Test.

In 1967 this Honorable Court made explicit that,

> [T]he Fourth Amendment protects people, not places. What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. [Citations omitted.] But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected. *Katz v. United States*, 389 U.S. 347, 351-2 (1967).

While the *Katz* case itself dealt with electronic bugging of a telephone booth, subsequent decisions of both this Court and the Circuit Courts of Appeal have made clear that physical searches and seizures of tangible items are covered by the test as well. Thus, in *Terry v. Ohio*, 392 U.S. 1, 9 (1968), this Court applied the protection of *Katz* to an individual on a public street.

> We have recently held that "the Fourth Amendment protects people, not places," *Katz v. United States*, 389 U.S. 347, 351, 88 S.Ct. 507, 511, 19 L Ed 2d 576 (1967), and wherever an individual may harbor a reasonable "expectation of privacy," *Id.*, at 361, 88 S.Ct. at 507 (Mr. Justice Harlan, concurring), he is entitled to be free from unreasonable governmental intrusion.... Unquestionably petitioner was entitled to the protection of the Fourth Amendment as he walked down the street in Cleveland. *Id.*, at 9.

In *Mancusi v. DeForte*, 392 U.S. 364 (1968), the *Katz* test was applied to the warrantless search for union records of an office which the defendant Mancusi shared with several other union officials.

> The Court's recent decision in *Katz* ... also makes it clear that capacity to claim the protection of the [Fourth] Amendment depends not upon a property right in the invaded place but upon whether the area was one in which there was a reasonable expectation of freedom from governmental intrusion. *Id.*, at 368.

Numerous decisions of the Circuit Courts of Appeal have analyzed situations outside the electronic surveillance

area in terms of *Katz*'s reasonable expectation of privacy test. See, *inter alia*, *Wattenburg v. United States*, 388 F.2d 853 (9th Cir., 1968) (search of trees thirty-five feet from suspect's motel); *United States v. Guadalupe-Garza*, 421 F.2d 876 (9th Cir., 1970) (border searches); *United States v. Case*, 435 F.2d 766 (7th Cir. 1970) (eavesdropping from hallway adjacent to suspect's business premises); *Piazzola v. Watkins*, 442 F.2d 284 (5th Cir. 1971) (police search of college dormitory rooms where the students had signed a consent form with the university); *Fraser v. United States*, 452 F.2d 616 (7th Cir., 1971) (grand jury subpoena after grant of transactional immunity); *Carpenter v. Sigler*, 419 F.2d 169 (8th Cir. 1969) (citizen driving an automobile).

In light of this case precedent, it seems clear that the reasonable expectation of privacy test has general applicability whenever there has been intrusive action by governmental officers. Because the old rules of trespass, penetration and property interests were inflexible and inappropriate to deal with rapidly changing conditions and technology of a modern society, this Court came to recognize that "the principal object of the Fourth Amendment is the protection of privacy rather than property, and [has] increasingly discarded fictional and procedural barriers rested on property concepts." *Warden v. Hayden*, 387 U.S. 294, 304 (1967). Commentators have noted that the former rules resulted in

"some strangely literal turns." Traynor, *Mapp v. Ohio At Large in the Fifty States*, 1962 Duke Law Journal 319, 332. It was against this background of inflexibility that the reasonable expectation of privacy test emerged.

This emphasis on privacy takes on new meaning in a modern industrial society. It is indispensable to our most fundamental and cherished values.

> We may wish to do or say things not forbidden by the restraints of morality, but which are nevertheless unpopular or unconventional. If we thought that our every word and deed were public, fear of disapproval or more tangible retaliation might keep us from doing or saying things which we would do or say if we could be sure of keeping them to ourselves or within a circle of those who we know approve or tolerate our tastes. Fried, *Privacy*, 77 Yale L. Journal, 475, 483-484 (1968).

One sanctuary for such privacy, long recognized by this Court, is a man's home. As the late Justice Frank noted,

> A man can still control a small part of his environment, his house; he can retreat thence from outsiders, secure in the knowledge that they can not get him without disobeying the

> Constitution. That is still a sizable hunk of liberty - worth protecting from encroachment. A sane, decent, civilized society must provide some such oasis, some shelter from public scrutiny, some insulated enclosure, some enclave, some inviolate place which is a man's castle. *U.S. v. On Lee*, 193 F.2d 306, 315-316 (2nd Cir. 1951) (Dissenting Opinion)

Today's modern, crowded, technological world threatens to invade even that enclave. Wiretapping and electronic surveillance have been recognized as such threats. *Berger v. N.Y.*, 388 U.S. 41 (1967); *U.S. v. U.S. Dist. Court Eastern Michigan*, No. 70-153, June 19, 1972. This Court took the necessary steps to ensure that modern technology would not circumvent the protections our Forefathers intended by the adoption of the Fourth Amendment. In the instant case, this Court is again faced with that choice - either permit an encroachment on our right to privacy or recognize the realities of the modern world and provide the protection envisioned by the Fourth Amendment.

Living in today's "castle," a citizen accumulates many items. Some of these items are innocuous; others are extremely private, e.g., love letters, old tax forms, letters from a lawyer or physician, contraceptives, political or religious printed matter, medical prescriptions, patent medicines, and bills.

Unable to provide storage indefinitely for all these items, a method for disposal must be found. Governmental ordinances and statutes severely curtail his options. Unlike his rural cousin, he is prevented from disposing of these items by burning or burying them. The same society which has denied the citizen these traditional methods of disposal has, however, developed a modern alternative - the refuse collector. The citizen, either through taxes or out-of-pocket, purchases this service for disposal of his personal discards. Items are placed in a garbage can, often sealed in a "baggie," to await collection. City ordinances often require the homeowner to place the cans on the sidewalk for collection, with regulations as to who may collect the containers, prohibiting unauthorized persons from tampering with the refuse. The contents of these containers are picked up and dumped into the well of a large truck, thereby losing "identity and meaning by becoming part of a large conglomeration of trash elsewhere." *People v. Krivda*, 5 Cal.3d 357, 366, 96 Cal. Rptr. 62, 68, 486 P.2d 1262, 1268 (1971).

Respondent and his neighbors have a reasonable expectation of privacy in this disposal method which the modern city has developed to replace the freedom of an earlier, simpler life where the citizen could personally dispose of his refuse without fear of governmental intrusion.

Petitioner takes issue with this contention and claims that no reasonable expectation of privacy existed due to the risk of exposure once the trash barrel was placed on the parkway for collection.[10] It is claimed that nosey neighbors, curious passersby, or domestic animals might disturb the contents, thereby precluding any expectation of privacy. However, as the court in *Krivda* recognized, a city ordinance made such tampering illegal, thereby indicating a recognition by the state of the intended privacy of a citizen's refuse disposal. Further, Respondent manifested a desire for privacy by placing the seized items in a closed bag inside the garbage can. In the method of collection, Respondent's refuse would have been commingled with his neighbors so as to lose its identity.

As this Court has stated, "what [an individual] seeks to preserve as private, even in an area accessible to the public, may be protected." *U.S. v. Katz, supra,* at 351-352.

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[10]Petitioner's citation to *U.S. v. Jackson,* 448 F.2d 963 (9th Cir. 1971) is inapposite since it involved the search of a trash can situated along a public passageway outside a motel room which the *police reasonably believed to have been vacated.*

Next, Petitioner[11] contends that Respondent gave the refuse collector such complete and unrestricted freedom over the contents of his garbage can that he accepted the risk that the collector would consent to a search of it by the police. Several assumptions are made in this argument, i.e., the collector gave consent to the police for the search rather than simply complying with police instructions; and the homeowner automatically gives complete and unrestricted freedom over the contents of his garbage to any collector.

By casting the facts in this light, Petitioner essentially begs the question. It was the *police* who ordered the garbage collectors to deviate from their normal routine, empty the well of their truck, specially pick up the contents of Respondent's trash can and return to a prearranged area for the *sole* purpose of inspection. It is not the garbage collector as a free agent acting in this case. Rather, it is the collector as police agent at work. The action is "cast in the form of a [garbage collection] to enable the officers to avoid the requirements of the Fourth Amendment." *Corngold v. U.S.*, 367 F.2d 1, 5 (1966). [See also *Stoner v. State of California*, 376 U.S. 483 (1964).] From this perspective, the question becomes the action of the police rather than the possible consent of the garbage collector to the governmental intrusion. The

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[11]Petitioner's Opening Brief at 8, 28, 30.

cases cited by Petitioner are distinguishable since they revolve around the independent actions of individuals who notify the authorities of their find as in *Gold v. U.S.*, 378 F.2d 588 (1967); or, there is no question that there is a voluntary consent to a police search as in *Clarke v. Neil*, 427 F.2d 1322 (1970). In the latter case, the court never considers the issue of whether the manager of a cleaning establishment is acting as an agent of the police since Appellant never raised that issue, and the court accepts this failure[12] as an admission that the search was *per se* lawful. The holding goes to the viability of the "mere evidence rule." (See *Clarke v. Neil, supra*, at 1324.)

A second question is raised in *U.S. v. Eldridge*, 302 F.2d 463 (1962), wherein the court holds that the loaning of a vehicle to a friend was the equivalent of an unrestricted use, including consenting to a police search of the trunk. The Court specifically noted that the result might have been "different," "if, for example, [the police] had explored

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[12] "Appellant does *not* contend that the manager of the cleaning shop had no authority to consent to the police search of the premises or that his consent was not voluntarily given. Therefore the search itself was unquestionably lawful. *Clarke v. Neil*, 427 F.2d 1322, 1324 (1970). (Emphasis added.)

under the floor carpeting or behind the upholstery."[13] *U.S. v. Eldridge, supra,* at 466. There is language in the opinion which indicates the result might have changed had there been "collusion" between the officers and the friend.

In the case at bar, the garbage collectors were acting in concert and at the behest of the police. Further, the arrangement which an individual enters into with his municipality or refuse collector is not unlimited. First, by ordinance, Respondent was *required* to dispose of his personal refuse by the use of the sanitation company. [*People v. Krivda*, 5 C.3d 357, 366, 486 P.2d 1262, 1268, 96 Calif. Rptr. 68 (1972).] Presumably, the only power given to the sanitation company is to remove Respondent's garbage from his home, commingle it with that of his neighbors, and deposit it at specified sites designated by the city. There is no unrestricted right to rummage through the contents of each bag or box, removing what the collector desires, and disposing of the remainder. Since Respondent is under compulsion via city regulation to dispose of his personal refuse in a particular manner, the only right the collector is given is to remove it to the local dump for destruction. The California court, after noting the applicable municipal ordinances, categorizes the relationship as one of limited consignment. [See *People v. Krivda,*

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[13]This would be the equivalent of the closed bag within the garbage can.

5 C.3d 357, 366, 486 P.2d 1262, 1268, 96 Cal. Rptr. 62, 68 (1971).] This limited power surely cannot be construed to be the equivalent of unfettered control over an item given to a friend to do with as he pleases. Consequently, the consent cases are inapposite to the facts at bar.'

Petitioner next contends that the refuse receptacle was abandoned, thereby precluding Fourth Amendment coverage under the authority of *Hester v. United States*, 265 U.S. 57 (1924) and *Abel v. United States*, 362 U.S. 217 (1960).

Under the test developed for determining whether an item has been abandoned, the courts have held that "abandonment ... is largely a question of intent." *U.S. v. Minker*, 312 F.2d 632, 634 (3rd Cir. 1962). The intention "to abandon will not ordinarily be presumed, and this is particularly true if the conduct of the owner can be explained consistently with a continued claim. Proof of abandonment must be made by the one asserting it by clear, unequivocal and decisive evidence." *Linscomb v. Goodyear Tire and Rubber Co.*, 199 F.2d 431, 435 (8th Cir. 1952).

Petitioner fails to meet the test set out in *Linscomb v. Goodyear Tire and Rubber Co., supra*, since no reasons are given for the conclusion that the contents of Respondent's refuse receptacle

were abandoned.[14] The record before this Court indicates the contrary intent. In our modern society, the discards of one's very personal life can be disposed of by only one method, i.e., refuse collection.

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[14]Petitioner cites several cases to support his inference of abandonment from Respondent's act of depositing the items in the disposal receptacle. These cases are inapposite.

In *Abel v. United States, supra,* the search of a waste basket in a hotel room was upheld since the room was vacated and hotel employees were free to examine its contents. In the case at bar, the items were removed from a closed receptacle in front of Respondent's occupied home.

In *United States v. Stroble,* 431 F.2d 1273 (6th Cir. 1970), the seized items were not found inside a container but lying exposed beside the trash container.

In *State v. Purvis,* 249 Ore. 404, 438 P.2d 1002 (1968), the items were seized in an open container in a hotel room. In addition, the Court's holding was based on the finding of no state action. See *Purvis v. Wiseman,* 298 F.Supp. 761 (1969), wherein a hearing on a writ of habeas corpus was granted to determine if indeed there had been state action, thereby implying no abandonment.

In *United States v. Dzialak,* 441 F.2d 212 (1971), the court fails to distinguish between the intent to abandon and the intent to dispose.

In any discussion of the concept of abandonment, a distinction must be made between the intent to abandon and the intent to dispose of personal effects. In abandoning an item, a citizen not only gives up any future possessory interest but holds no concern for the ultimate placement or destination of the item. The same is *not* true in the disposal of personal effects. While giving up future possessory interest, there is an interest to have the items come to rest in a particular place. The situation is analagous to the mailing of a letter or package to another party. The individual gives up his future possessory interest when he places that letter in the mailbox or turns the package over to a carrier. In both, however, his interest is that the items be delivered to a particular place. Respondent paid, either through taxes or out-of-pocket, to have his personal effects collected. His interest was that the items be removed from his closed container to the well of the refuse truck, commingled and deposited at the city dump. The intention is clear. Nosey neighbors or anyone else are to be precluded from sifting through the remnants of the most private area of his life.[15]

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[15]Three cases have stated that the placing of an item in a disposal receptacle does not establish abandonment. See *Work v. United States*, 243 F.2d 660

The argument is advanced that any Fourth Amendment protections in this area would make "the garbage receptacle an inviolate sanctuary for the concealment and disposal of evidence of crime." (See Petitioner's Opening Brief at 31.) There is no substance to this emotional argument, since the police are free to search any disposal receptacle suspected of containing contraband at a citizen's home if they take their information before an impartial magistrate and secure a warrant or establish an exception to the warrant requirement. The decision would, however, prohibit as an investigative tool the whimsical rummaging by police officers of the effects of the most personal areas of a citizen's life. This Court would thus ensure that a dweller in one of today's congested urban areas would, like his rural cousin, be assured privacy in the disposal of his personal effects.

(D.C. Cir. 1957); *State v. Chapman*, 250 A.2d 203 (S.C. Maine 1969); and *People v. Edwards*, 71 C.2d 1096, 458 P.2d 713, 80 Cal. Rptr. 633 (Calif. S.C. 1969).

B. Trash Collectors Acted as Agents for the Police.

The California Supreme Court in its opinion below necessarily held that the action of the trash collectors was governmental action attributable to the police. This follows from the fact that the court repeatedly referred to the issue before it as a "search of defendants' trash barrels." *Krivda, supra,* at 364.[16] Since only the trash collectors handled the garbage cans, the court had to conclude that they were acting as agents of the police and hence that the legal

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[16]Note the following language also: "The question remains whether defendants herein had a reasonable expectation of privacy with respect to the contents of their trash barrels." *Krivda, supra,* at 365. "The placement of one's trash barrels onto the sidewalk for collection is not, however, necessarily an abandonment of one's trash to the police or general public." *Id.*, at 366. "We should hesitate to encourage a practice whereby our citizens' trash cans could be made the subject of police inspection without... a search warrant." *Id.*, at 367. "[T]he marijuana found in defendants' trash barrels was the result of an illegal search and seizure." *Id.*, at 367. Note, too, that in *Edwards, supra,* no trash collectors were involved, and the California Supreme Court specifically held *Krivda* to be indistinguishable from *Edwards. Krivda, supra,* at 66-67, and at 66 fn. 7.

basis for the search was the same as though the police had themselves searched the cans. *Stapleton v. Superior Court of Los Angeles County*, 70 Cal.2d 97,101, 447 P.2d 967, 970, 73 Cal. Rptr. 575, 578 (1969).

The determination by the California Supreme Court is binding on this Court. The nature and scope of the powers of the police are matters of peculiarly local concern. While the Federal Constitution sets minimum standards as to what constitutes governmental action, the states are surely free to expand upon the concept for the protection of their citizens. California itself has gone far toward articulating and clarifying this power. See, e.g., *West's Annotated California Penal Code* Sections 830 et seq., 833 et seq., 1530-1533. The California Supreme Court, in necessarily finding that the trash collectors were agents of the police, was ruling on the use and delegation of the police's power. The court decision was entirely consistent with a well-established line of prior state cases holding similar use of private persons to be governmental action. *People v. Tarantino*, 45 Cal.2d 590, 595, 290 P.2d 505 (1955); *People v. Fierro*, 236 CA 2d 344, 46 Cal. Rptr. 132 (1965); *Stapleton v. Superior Court of Los Angeles County, supra*, 70 Cal.2d 97, 73 Cal. Rptr. 575, 447 P.2d 967 (1969). Under such circumstances, the ruling of the California Supreme Court may not be disturbed by this Honorable Court. *Murdock v. Memphis, supra*, 87 U.S. 590 (1875).

A finding that the trash collectors were acting as agents of the police is compelled under federal law as well as state law. The relevant principles were first set forth in *Byars v. United States*, 273 U.S. 27, 32-33 (1927).[17] There a federal agent was asked by state officers to accompany them in the execution of a state search warrant. The search turned up evidence of a federal crime. Because, prior to *Elkins v. United States*, 364 U.S. 206, 80 S.Ct. 1437, 4 L Ed 2d 1669 (1960), "state police were considered as private parties relative to federal prosecutions,"[18] this Court was faced with the issue of whether the search was carried out as a federal police search, so that the exclusionary rule would apply. Despite the fact that the state officers had obtained a search warrant without federal prompting and that the federal agent accompanied the four state officers only

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[17] More recently, in *Massiah v. United States*, 377 U.S. 201, 206-207 (1964), this Court found that statements elicited by a co-defendant, who was cooperating with the police, from an individual under indictment, violated that individual's Sixth Amendment right to counsel. An essential element in reaching this result was a finding of governmental action. The use of the co-defendant by the police provided this link.

[18] *United States v. Masterson*, 251 F. Supp. 937, 940 (D.C.N.Y., 1966), aff'd 383 F. 2d 610; *cert. den.* 385 U.S. 833.

by request of one of them, this Court held that,

> The search in substance and effect was a joint operation of the local and federal officers. In that view, so far as this inquiry is concerned, the effect is the same as though he had engaged in the undertaking as one exclusively his own. *Id.*, at 33.

Corngold v. United States, 367 F.2d 1 (9th Cir. 1966) is on all fours with the instant case. There, federal customs agents suspected defendant was in possession of illegally imported watches. They located him and two companions at the TWA cargo loading platform at the Los Angeles Airport. The agents approached TWA's ramp manager and asked him to find out about the boxes Corngold was shipping, from Corngold's companion. The ramp manager located the packages for the agent. When Corngold and his companions had left, the agents returned, conducted a "scintillator" test of Corngold's packages, and told the TWA transportation agent they suspected the package contained watches. After determining that the TWA agent had authority to open the package, the customs agents ordered him to do so. He complied. A number of Swiss watches were found. The Court held the search of the packages was not a private search.

> [A]t the very least, the search of appellant's package was a joint operation of the customs agents

> and the TWA employee. When a federal agent participates in such a joint endeavor, "the effect is the same as though he had engaged in the undertaking as one exclusively his own." *Byars* ... As Justice Frankfurter said in *Lustig v. U.S.*, 338 U.S. 74, 78-79 ...
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> > "It is immaterial whether a federal agent originated the idea or joined in it while the search was in progress. So long as he was in it before the object of the search was completely accomplished, he must be deemed to have participated in it all."
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> *Corngold, supra,* at 6.

The instant case is covered by the principle and facts of *Byars, Massiah* and *Corngold.* The search constituted police action as a matter of federal law. Consider the extent of involvement of Officers Gates and Marsden in controlling the conduct of the refuse collectors. The officers required the collectors to empty their truck, drive at once to 1901 Norden, empty the trash barrels there, drive one block north, stop and allow the officers to sift through the trash. The whole procedure was unlike the normal routine. Nothing indicates that, but for the police commands, the collectors would have treated the Krivdas' trash any differently from any other trash barrel. Nor is it likely that the

trash collectors would have observed anything illegal since "the contraband was concealed in paper sacks within the barrels." *Krivda, supra,* at 366. On these facts the search is precisely like that in *Corngold, supra.* The search cannot be classified as a private search because the police controlled the conduct and the scope of the search of the Krivdas' trash can.

C. The Curtilage Doctrine.

The protections afforded by the Fourth Amendment have not been restricted to the interior of houses, but have been extended to open areas immediately adjacent. *Wattenberg v. U.S.*, 388 F.2d 853 (9th Cir. 1968). Under this doctrine, usually referred to as curtilage, a close analysis of the facts is necessary to determine if the area in question is covered. The Tenth Circuit in *Care v. U.S.*, 231 F.2d 22, 25 (1956) enunciated the test to be used.

> Whether the place searched is within the curtilage is to be determined from the facts, including its proximity or annexation to the dwelling, its inclusion within the general enclosure surrounding the dwelling, and its use and enjoyment as an adjunct to the domestic economy of the family.

In the case at bar, the contents of Respondent's garbage can were sifted and

examined by the police after an elaborate ruse to obtain them. It would appear from the facts that the garbage cans were kept on the front porch of the respondent's house since that is where they were taken to after the garbage collector had gone. *People v. Krivda*, 5 C.3d 357, 360, 486 P.2d 1262, 1263, 96 Cal. Rptr. 62 , 63 (1971). The police gained access to the cans by asking the collector to remove the trash in the well of his truck, pick up Respondent's cans and empty them, and then return to the police so that the police might examine the garbage. By this method, the police avoided seizing and searching the can themselves. In order to analyze fairly the actions of the police, this ruse must be viewed as such and the garbage collector as their agent. Since everything the garbage collector did was at the invitation and direct order of the police, the issue becomes whether the police had a right to search Respondent's garbage can without a warrant. Further, a local municipal ordinance required Respondent to place his garbage can on the public sidewalk if he wanted it to be collected. [See *People v. Krivda*, 5 C.3d 357, 366, fn. 7, 486 P.2d 1262, 1268, 96 Cal.Rptr. 62 , 68 (1971).] As a result, the trash can was on the public sidewalk rather than on the porch of the house where it was customarily kept. Since a person's constitutional protections cannot be limited by the employment of

a municipal ordinance,[19] Respondent's case should be analyzed by placing him in the same position as others without the ordinance, i.e., as if the garbage cans were searched while on the front porch of Respondent's residence.

Applying these facts to the test enunciated in *Care v. U.S., supra,* it is clear that Respondent's garbage can falls within the curtilage of his home. It is on the front porch of the house which makes it in "proximity or annexation to the dwelling" and within the "general enclosure surrounding the dwelling" and the cans were used as an "adjunct to the domestic economy of the family" since no family in this day and age can do without one. Therefore, the cans on the porch come within the protected area of the Fourth Amendment.

The facts of this case are stronger than those found in *Work v. U.S.,* 243 F.2d 660 (D.C. Cir. 1957), wherein the circuit court held,

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[19] *Bailey v. Alabama,* 219 U.S. 219, 239 (1911).

> "It is apparent that a constitutional prohibition cannot be transgressed indirectly by the creation of a statutory presumption any more than it can be violated by direct enactment."

[See also, *Sherbert v. Verner,* 374 U.S. 398 (1963) and *Speiser v. Randall,* 357

> The trash receptacle in which the phial was found was in close proximity to the house. It was an adjunct to the domestic use of the home by appellant. It was within the curtilage or general enclosure surrounding the dwelling. *Id.*, at 662.

Since any governmental incursion of the curtilage is covered by the Fourth Amendment, the actions of the garbage collectors as agents of the police clearly must meet the warrant requirement. Therefore, the search of the garbage cans and the seizure of their contents was unconstitutional since it was carried out without a warrant.

U.S. 513 (1958) which are analagous, since both disallow a diminution of a constitutional right by adoption of a state statute.

III.

THE EXCLUSIONARY RULE IS REQUIRED TO GIVE MEANING AND SUBSTANCE TO THE FOURTH AMENDMENT AND TO ENSURE THE CONTINUATION OF JUDICIAL INTEGRITY WITHIN THE CONCEPT OF ORDERED LIBERTY.

A. The Rationale of the Rule.

In any consideration of the viability and scope of the Exclusionary Rule, it should be remembered that it serves a twofold purpose, i.e., to deter law enforcement officers from engaging in unconstitutional searches and seizures by removing their incentive to do so, and to relieve the courts from being compelled to participate in such illegal conduct. [See *Weeks v. U.S.*, 232 U.S. 383 (1914).] The latter purpose is often overlooked in the haste of critics to narrow the scope of or to eliminate the Exclusionary Rule completely. There is good reason for this avoidance since any change in application or scope would come into direct conflict with the second, and perhaps, most important reason for the rule.

> In a government of laws, existence of the government will be imperilled if it fails to observe the law scrupulously. Our Government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the Government becomes a law breaker, it breeds contempt for law; it invites every man to

> become a law unto himself; it invites anarchy. To declare that in the administration of the criminal law the end justifies the means - to declare that the Government may commit crimes in order to secure the conviction of a private criminal - would bring terrible retribution. Against that pernicious doctrine this Court should resolutely set its face. *Olmstead v. U.S.*, 277 U.S. 438, 485 (1928), (Brandeis, J. dissenting).

The respect for the "imperative of judicial integrity" has been reduced by some commentators to a "game" played by the state and the accused.[20] However, this aspect of the rule cannot be so lightly dismissed for the integrity of the system plays a very real role in the viability of the republic.[21]

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[20] See *Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388, 414 (1971), where in dissent the statement is made that "the Exclusionary Rule does not ineluctably flow from a desire to ensure that government plays the 'game' according to the rules."

[21] "Of course criminal prosecution is more than a game. But in any event it should not be deemed to be a dirty game in which 'the dirty business' of criminals is outwitted by 'the dirty business' of law officers. The contrast between morality professed by society and immorality practiced on its behalf makes for

In a democratic system, if the citizens have no respect for the government and its institutions, it is only a matter of a few steps to the disintegration of that society. In an age when our institutions are under attack as they have never been before, it is scarcely the time for the government to set into motion forces which will undermine the confidence of citizens in their system. When an individual's liberty hangs in the balance, the government must act in accord with its own rules or else it compromises its right to require its citizens to follow its rules. The society is faced with the anomaly of the state punishing, usually rather harshly, the individual citizen who breaks the law - based on a conviction which was gained as a direct result of the lawlessness of the government itself. This brings internal conflict which places great stress on continued respect for the government.

It is not only the integrity of the courts to which this problem is addressed, but also the integrity of the Constitution which protects each individual within our society.

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contempt of law. Respect for law can not be turned off and on as though it were a hot-water faucet." *On Lee v. United States*, 343 U.S. 747, 758, 759 (1951), (Frankfurter, J., dissenting).

> The tendency of those who execute the criminal laws of the country to obtain conviction by means of unlawful seizures ... *should find no sanction in the judgments of the courts* which are charged at all times with the support of the Constitution and to which people of all conditions have a right to appeal for the maintenance of such fundamental rights. *Weeks v. United States*, 232 U.S. 383, 392 (1914). (Emphasis added.)

If a society expects its citizens to uphold the law, it can expect no less from its government. The concern for the plight of the police within our system, outlined in the briefs of Amici, is commendable, but it ignores the fact that our police will lose more respect if they earn convictions of citizens with "unclean hands," resulting from illegal acts. Our police deserve better than that. As this Court observed in *Miller v. United States*, 357 U.S. 301, 313 (1958), "the history of the criminal law proves that tolerance of shortcut methods in law enforcement impairs its enduring effectiveness."

A large number of the cases coming before our trial courts today (in which violations of the Fourth Amendment are alleged) involve marijuana and dangerous drug complaints against persons under 25 years of age. It is important that these young people perceive that the system is a fair and just one. When they come in contact with the court and

observe that, if the officer has violated their constitutional rights the state is precluded from using the evidence against them, they cannot help but respect that system. It is graphically brought home to them that the Bill of Rights is not simply words put to paper at the founding of the republic, but is a reality in this complex twentieth century. They find that the decision of the court,

> founded on reason and *truth*, gives to the individual no more than that which the Constitution guarantees him, to the police officer no less than that to which honest law enforcement is entitled, and, to the courts, that judicial integrity so necessary in the true administration of justice. *Mapp v. Ohio*, 367 U.S. 643, 660 (1961).

The Attorney General of Illinois in his Amicus brief speaks in terms of the rule "punishing society." *Amicus Brief of the State of Illinois*, at p.4. How is society punished by a rule that ensures that the state respects its citizens' constitutional rights and does not benefit by any violation of those rights? How does the rule punish society when it underscores the fact that the Bill of Rights is not merely rhetoric but a living, breathing document that speaks to each individual and disallows the state to profit from its own wrongdoing?

B. Suggested Changes in the Rule.

The argument is put forward that because the police have refused to follow the law and respect the Constitution, the individual citizen's constitutionally guaranteed right to be free from unreasonable searches and seizures should be eliminated. This reasoning suggests that rules of proper behavior should be changed because the police refuse to follow them. If this were taken to its logical conclusion, the laws against bribery of a public official would be removed from the statute books because in recent exposures in New York City it has been charged that many police accept bribes. A premium is placed on disrespect of the law by the enforcers of the law. The lesson to the police is clear. If they ignore constitutional limitations on their power long enough, the courts will simply change the rule to fit their behavior. A most curious rule for any society; and a most dangerous rule for a democratic society.

It is further suggested that the scope of the rule be narrowed to cover only those violations of the constitution which are blatant; that where there are "inadvertent errors of judgment" the violation be overlooked. [See *Bivens v. Six Unknown Federal Narcotics Agents, supra*, at 418.] However, the state does not follow that rule with regard to its citizens' violation of the rules of the criminal law. Citizens are prosecuted every day for "inadvertent errors of judgment" and they are fined and

sentenced for those "errors."[22] Why should the government be excused when its citizens are not? Should there not be equality under the law?

The idea of a "rationally graded response" to the violation of the Fourth Amendment is the equivalent of holding that a little bit of illegal activity is all right. This concept would strike at the heart of our criminal justice system. Further, it would encourage the police to "search now, justify later."

Many commentators call for clearer, more definitive rules in this area, and then advocate a vague and indefinite standard for a police officer on the beat to follow. For example, the suggestion is made that the proper test would be whether "no reasonable cause [existed] to believe there was reasonable cause." *Amicus Brief of State of Illinois*, at 11. If the police are having difficulty at the present time determining whether they must secure a search warrant and whether they have established probable cause for foregoing the warrant, consider the difficulty of deciding whether a cause is reasonable or not. The end result of such a rule would be to search and hope the court would later find it reasonable. At least under the present rule, the

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[22]For example, under California law, a person can be convicted for offenses ranging from speeding to involuntary manslaughter due to his "error of judgment."

officer knows that if he errs, the evidence cannot be used.

> It is perhaps worth repeating that although this court may now be faced with the choice of justifying a warrantless search or letting a guilty man go free, that choice did not face the customs officers. They could have secured a warrant, or, if probable cause for search was lacking, continued their investigation until information establishing probable cause was obtained. *Corngold v. U.S.*, 367 F.2d 1, 8 (9th Cir. 1966).

There is no data which has been presented to this Court which would justify the elimination or drastic narrowing of the scope of the Exclusionary Rule. Even the author of the most thorough empirical study of this aspect of the rule came to the conclusion that his data did not provide any "empirical substantiation or refutation of the deterrent effect of the Exclusionary Rule."[23]

There is graphic evidence that the Fourth Amendment does not work without it. *People v. Cahan*, 44 C.2d 434, 282 P.2d 905 (1955). The experience of the

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[23]Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 Chicago Law Review 665, 709 (1970).

California courts should not be dismissed lightly. In his discussion concerning the merits of the rule, former Chief Justice Roger Traynor of the California Supreme Court was "compelled to reach" the conclusion that "other remedies have failed to secure compliance with the constitutional provisions on the part of police officers with the attendant result that the courts under the old rule (allowing admission) have been constantly required to participate in, and in effect condone, the lawless activities of law enforcement officers." *People v. Cahan*, 44 C.2d 434, 445, 282 P.2d 905 (1955).

The real danger in narrowing the scope of the Rule or eliminating it entirely is the impact it would have on our criminal justice system.

> When, as in the present case, the very purpose of an illegal search and seizure is to get evidence to introduce at a trial, the success of the lawless venture depends entirely on the court's lending its aid by allowing the evidence to be introduced. It is no answer to say that a distinction should be drawn between the government acting as law enforcer and the gatherer of evidence and the government acting as judge. '[N]o distinction can be taken between the Government as prosecutor and the Government as judge. If the existing code does not permit district attorneys to have a hand in such dirty business

> it does not permit the judge to allow such iniquities to succeed.' *(Citation)* Out of regard for its own dignity as an agency of justice and custodian of liberty the court should not have a hand in such "dirty business." *People v. Cahan*, 44 C.2d 434, 445, 282 P.2d 905 (1955).

In the Amicus Brief filed by the Americans for Effective Law Enforcement, data is presented which allegedly proves that the police are following the edicts of the court governing the Fourth Amendment at least 84% of the time. On the other hand, the Amicus Brief filed by the State of Illinois argues that the rule should be eliminated because the police ignore the rule or are not aware of the guidelines set out by the court for police conduct. These arguments cancel each other out. With such inconclusive and inconsistent data at hand, certainly judicial conservatism would dictate that the Exclusionary Rule should not be eliminated or narrowed without more substantial corroboration.

Throughout the discussion of the problem, the tendency for those who are critical of the rule is to speak in terms of the "honest" citizens as opposed to the "criminals" or the "guilty."[24] As one commentator has noted,

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[24]See Petitioner's Opening Brief at 42.

> It is seriously misleading, however, to suggest that wholesale release of the guilty is a consequence of the exclusionary rule. It is a large assumption that the police have invariably exhausted the possibilities of obtaining evidence legally when they have relied upon illegally obtained evidence. It is more rational to assume the opposite when the offer of illegally obtained evidence becomes routine. Traynor, *Mapp v. Ohio at Large in the Fifty States*, 1962 Duke L. Journal 319, 322 (1962).

This kind of dichotomy between the "honest" citizen and the "criminal" can only lead to emotional responses rather than rational ones. It should not be forgotten that it is the person with unpopular views, for example, who tests the constitutional right to free speech; it is the person who is prosecuted for the violation of some offense who tests the validity of the words that proclaim procedural due process in our society. As long as the discussion emphasizes that "honest, upright citizens" are on the one side and the law violator on the other, the only conclusion that can be arrived at is that these rights that protect the outcasts and unpopular within our society should be eliminated.

> The understandably impatient law-abiders, who approve official retribution without restraint against wrongdoers, do not visualize

> themselves as the objects of oppressive government action in any near future. Not for them are the warnings of history. Traynor, *Mapp v. Ohio At Large in the Fifty States*, 1962 Duke L. Journal 319 at 319 (1962).

It is only a short step to the abolition of all our rights under the Bill of Rights if constitutional problems are placed in this framework since the only persons who directly test the protections are the pariahs of our society. Such a danger was recognized by this Court in *Boyd v. U.S.*, 116 U.S. 616, 635 (1886).

> It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. *Id.*, at 635.

A number of alternatives have been suggested by the critics of the Exclusionary Rule.[25] However, there is no

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[25] See Oakes, *Studying the Exclusionary Rule in Search and Seizure*, 37 University of Chicago Law Review 665 (1970), wherein it is suggested that criminal or tort liability, internal or external review procedures, the Civil Rights Act, and contempt of court proceedings are possible alternatives to explore.

evidence that any of these alternatives are effective. One problem is central to all these recommendations, i.e., the absence of any pressure to prosecute vigorously these alternatives. At least with the present rule, an individual who is charged with an offense will test the validity of the search or seizure if it violates the rules laid down by the courts. A salutary effect of this is that search and seizure issues are litigated and the boundaries and protections of the Fourth Amendment become rules of law enunciated by our courts.

Consider, for example, two ramifications of the alternatives suggested. It is often argued that some type of tort remedy should be developed to replace the Rule. In a criminal justice system where plea bargaining plays a preeminent role, it takes very little imagination to perceive that if the remedy is an effective one, the remedy will enter into the negotiation. If there has been an arguable violation of the Fourth Amendment, the officer's self-interest would be served by obtaining some kind of an agreement out of the accused that he not pursue the tort remedy in return for the lowering of the charge or dismissal of the complaint. This would, in turn, encourage over-charging of offenses to give the officer as much maneuverability as possible in these negotiations. The practical result of the theoretical idea of benefiting those individuals whose rights have been violated - the further corruption of the system with contempt for the police,

courts, and all involved felt by those who are brought into the system. The further loss of respect for our institutions by those in the society with whom it comes in contact would exacerbate the problems facing criminal law today.

Further, it is unrealistic to believe that the individual who has been found in possession of contraband, albeit by illegal police action, and has been sentenced, would turn around and sue the same individuals who are now his jailers for a violation of his Fourth Amendment rights during the arrest. The temptation of the police to discourage such a suit would be great and the methods of intimidation subtle but effective. Once again, the result would be the further corruption of our police, a growing disrespect for the state and its institutions, and an empty remedy for a citizen whose rights have been violated by the state.

It is folly to expect the powerless within the society to pursue remedies against the authorities since the poor often lack the resources, energy, time and knowledge to make alternatives complete remedies. At least at the present time, defense attorneys and public defenders who represent the indigent can raise these issues.

The courts of this land are still the foremost protectors of the constitutional rights of its citizens. If the Fourth Amendment is to have any meaning, it is clearly necessary that there be some

reasonable amount of judicial attention to questions concerning police practices. It is clear that the Exclusionary Rule does this.[26] For that reason alone, it should not be altered or abolished. Let us keep the Constitution as our blueprint for freedom and justice, not reduce it to the status of a document of value only for its historical interest.

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[26]See Paulsen, *The Exclusionary Rule and Misconduct by the Police*, 52 J. Crim. Law, C. and Pol. Sci., 255, 260 (1961).

CONCLUSION

Amicus respectfully requests this Court to dismiss the Petition for Writ of Certiorari as improvidently granted since the decision rendered by the California Supreme Court rests on independent state grounds.

Respectfully submitted,

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